

**Ho Nim Tsin v The Director of Land and Survey Department  
& Anor** A

HIGH COURT (KOTA KINABALU) — CASE NO BKI-21-47 OF 2010 B  
RAVINTHRAN J  
13 FEBRUARY 2013

*Civil Procedure — Limitation of action — Action for recovery of land — C  
Application to determine questions of law and dismissal of action — Claim against  
land acquisition — Land acquired in 1973 for building of Institute of Higher  
Learning — Land not developed and alienated to other individuals under new title  
number — Request for return of land — Whether action for recovery of land  
time-barred — Present registered owners not made parties — Whether court could  
grant remedy prayed for in writ of summons — Rules of the High Court 1980 O 33 D  
r 2*

This was an application by the defendant under O 33 r 2 of the Rules of the  
High Court 1980 to determine two questions of law and dismiss the present E  
action. The plaintiff had claimed against the State Government in relation to a  
land acquisition exercise executed in 1973. The plaintiff was then the co-owner  
of 4.87 acres of land held under a provisional lease while the other co-owners  
were his mother and his siblings. The plaintiff complaint was that even though  
the land was compulsorily acquired for the purpose of building an institute of F  
higher learning, he noticed in 2008 that there was no development on the said  
land. He then requested for the return of the land but his request was rejected.  
In 2010, the plaintiff discovered that the said land had been alienated to three  
individuals under a new title number. The defendants applied for dismissal of  
the present action in the event the preliminary questions were determined in G  
their favour. The two questions of law raised were whether the action was  
time-barred; and whether the court could grant the remedy prayed for in the  
writ of summons as the present registered owners were not made parties. The  
defendants contended that the suit should be dismissed as the acts and/or  
omissions complained occurred in 1973 and 1992 and therefore pursuant to H  
s 2 of the Public Authorities Protection Act 1948 ('the Act'), the action could  
not lie or be instituted unless it was commenced within 36 months of the said  
acts and/or omissions; and that the registered owners of the land were not  
parties in this action and therefore the court could not make any valid orders  
affecting the rights and interests of the said registered owners which what the I  
plaintiff is in effect praying for in this action.

**Held**, dismissing the plaintiff's claim:

- (1) The preliminary issue was in respect of limitation law. In the event the

- A issue was decided in favour of the defendants, it would be unnecessary to proceed to trial. The issue whether the action was time-barred could be suitably determined upon affidavit evidence. The basic facts underlying the issue of limitation in this case were common ground and not in dispute. There was no dispute that the land was subjected to compulsory acquisition in 1973. It was a matter of filing record that the instant action was instituted only in 2010 (see para 9).
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- (2) The plaintiff had prayed for a declaration that the acquisition was unlawful because the land was not put to use for the specified purpose it was acquired. There was no argument that there was a 'continuance of injury or damage', the notification of the acquisition was not properly *gazetted* and that the plaintiff was not properly compensated in 1973. As the acquisition process was properly completed, the plaintiff's right to the land had been severed. The mere formulation of a declaratory prayer by the plaintiff in the instant case could not prevent the limitation period prescribed in s 2(a) of the Act from affording an absolute defence to the action (see para 20).
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**[Bahasa Malaysia summary]**

- E Ini adalah permohonan oleh defendan di bawah A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk menentukan dua soalan undang-undang dan menolak tindakan ini. Plaintiff telah menuntut terhadap Kerajaan Negeri berkaitan pelaksanaan pengambilan tanah disempurnakan pada 1973. Plaintiff pada ketika itu adalah pemilik bersama 4.87 ekar tanah yang dipegang di bawah pajakan sementara sementara pemilik yang lain adalah emak dan adik beradiknya. Plaintiff mengadu bahawa walaupun tanah tersebut diambil secara wajib bagi tujuan membina pusat pengajian tinggi, dia mendapati bahawa pada tahun 2008 tidak terdapat pembangunan di atas tanah tersebut. Dia kemudiannya memohon untuk pemulangan tanah tersebut tetapi permohonanannya ditolak. Pada tahun 2010, plaintiff mendapati bahawa tanah tersebut telah diperuntukkan kepada tiga individu di bawah nombor hak milik baru. Defendan-defendan memohon untuk penolakan tindakan ini sekiranya soalan-soalan awal ditentukan memihak mereka. Kedua-dua soalan undang-undang yang dibangkitkan adalah sama ada tindakan adalah dihalang masa; dan sama ada mahkamah boleh memberikan remedi yang dipohon di dalam writ saman memandangkan pemilik berdaftar sekarang tidak dibuat sebagai pihak. Defendan-defendan berhujah bahawa tindakan tersebut patut ditolak memandangkan tindakan-tindakan dan/atau ketinggalan yang diadukan berlaku pada tahun 1973 dan 1992 dan oleh itu berikutan s 2 Akta Perlindungan Pihak Berkuasa Awam 1948 ('Akta'), tindakan tersebut tidak dapat diambil atau dimulakan kecuali ia telah dimulakan dalam masa 36 bulan daripada tindakan-tindakan dan/atau ketinggalan tersebut; dan bahawa pemilik-pemilik berdaftar tanah tersebut bukan pihak di dalam tindakan ini dan oleh itu mahkamah tidak dapat membuat apa-apa perintah sah yang
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menjejaskan hak dan kepentingan pemilik-pemilik berdaftar dengan apa yang plaintif sebenarnya memohon di dalam tindakan ini.

**Diputuskan,** menolak tuntutan plaintif:

- (1) Isu awalan adalah berkaitan undang-undang had masa. Sekiranya isu diputuskan memihak defendan-defendan, adalah tidak perlu meneruskan kepada perbicaraan. Isu sama ada tindakan adalah dihalang masa boleh ditentukan secara sesuai atas keterangan afidavit. Fakta asas yang mendasari isu had masa dalam kes ini adalah alasan yang sama dan tidak dipertikaikan. Tidak terdapat pertikaian bahawa tanah ditaklukkan kepada pengambilan wajib pada tahun 1973. Ia adalah perkara pemfailan rekod bahawa tindakan ini dimulakan hanya pada 2010 (lihat perenggan 9).
- (2) Plaintif telah memohon untuk perisytiharan bahawa pengambilan tanah adalah tidak sah kerana tanah tersebut tidak digunakan untuk tujuan tertentu ia diambil. Tidak terdapat penghujahan bahawa terdapat 'continuance of injury or damage', pemberitahuan pengambilan tanah tersebut tidak diwartakan dengan betul dan bahawa plaintif diberikan pampasan secara betul pada tahun 1973. Memandangkan proses pengambilan tanah diselesaikan dengan betul, hak plaintif kepada tanah telah terputus. Perumusan semata-mata terhadap permohonan perisytiharan oleh plaintif dalam kes ini tidak dapat menghalang tempoh had masa yang dinyatakan di dalam s 2(a) Akta daripada memberikan pertahanan mutlak kepada tindakan tersebut (lihat perenggan 20).]

#### Notes

For a case on action for recovery of land, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5506.

#### Cases referred to

*Balare Jabu & Ors v Merawa Sdn Bhd & Ors* [2011] 4 CLJ 751, CA (distd)  
*Palaniappa Chettiar v Sithambaram Chettiar & Ors* [1982] 1 MLJ 186, FC (refd)  
*Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)  
*SI Rajah & Anor v Dato Mak Hon Kam & Ors* [1993] 3 MLJ 741; [1994] 1 CLJ 207, HC (refd)  
*United Development Company Sdn Bhd v The State Government of Sabah & Anor* [2011] 7 MLJ 209; [2010] 5 CLJ 98, HC (not folld)

#### Legislation referred to

Federal Constitution art 13  
 Land Acquisition Ordinance (Sabah Cap 69) s 3  
 Public Authorities Protection Act 1948 s 2, 2(a)

- A Rules of the High Court 1980 O 33 rr 2, 5  
*Vivian Chew (Goh & Associates) for the plaintiff.*  
*Roderic Fernandez (Sabah State Attorney General) for the defendants.*

B **Ravinthran J:**

INTRODUCTION

- C [1] This is an application by the defendant under O 33 r 2 of the Rules of the High Court 1980 to determine two questions of law and dismiss the action.

BACKGROUND FACTS

- D [2] The plaintiff's claim against the state government is related to a land acquisition exercise that was executed way back in 1973. The plaintiff was then the co-owner of 4.87 acres of land held under Provisional Lease No 13342. The other co-owners were his mother and his siblings. The said land was previously  
E owned by the father of the plaintiff who had passed away in 1959. The plaintiff's complaint is that the land was compulsorily acquired for the purpose of building an institute of higher learning. However, in 2008, the plaintiff noticed that there was no development on the said land and thus he requested for the return of the land. However, his request was rejected. In 2010, the  
F plaintiff discovered that the said land had been alienated to three individuals, ie Yun Chi Syn, Lin Nyuk Yun and Cheong Sin Fatt under a new title number.

APPLICATION UNDER O 33 R 2

- G [3] Order 33 r 2 of the Rules of the High Court 1980 reads as follows:

The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give  
H directions as to the matter in which question or issue shall be stated.

[4] The defendants have applied for dismissal of the action in the event the preliminary questions are determined in their favour.

- I [5] Order 33 r 5 reads as follows:

Rule 5 Dismissal of action, etc. after decision of preliminary issue.

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(O.33 r. 5) If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

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[6] The two questions of law that were set for determination under the instant summons in chambers are:

- (a) whether the action is time barred; and
- (b) whether the court can grant the remedy prayed for in the writ of summons as the present registered owners are not parties.

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[7] In respect of the second question, apart from a claim for damages, the plaintiff also sought the following remedies:

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- (a) a declaration that the acquisition is null and void;
- (b) a declaration that the issuance of the new country lease title is null and void;
- (c) an order that the said land presently held under the new country lease title is alienated back to the plaintiff; and
- (d) alternatively, the defendants compensate the plaintiff for the market value of the land.

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[8] The grounds of application of the defendants to dismiss the suit are as follows:

- (a) the acts and/or omissions complained occurred in 1973 and 1992 and therefore pursuant to s 2 of the Public Authorities Protection Act 1948 ('Act 198'), this action cannot lie or be instituted unless it is commenced within 36 months of the said acts and/or omissions; and
- (b) the registered owners of the land held under CL No 015507383 are not parties in this action and therefore this honourable court cannot make any valid orders affecting the rights and interests of the said registered owners which what the plaintiff is in effect praying for in this action.

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[9] In apparent deference to the second ground of the application, counsel for plaintiff has indicated in her submission that the plaintiff would only be pursuing for a declaratory order that the acquisition was unlawful and for compensation. Thus the plaintiff is not seeking for re-alienation of the land from its present registered owners who are not parties to the instant action. In the premises, the second question framed in the summons in chambers is

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- A academic and does not require determination. As for the application under O 33 r 2, there is ample authority for the proposition that the court has the power to determine any preliminary issue that could conclude the whole proceedings and it would be unnecessary to try the other issues (see *Palaniappa Chettiar v Sithambaram Chettiar & Ors* [1982] 1 MLJ 186, *SI Rajah & Anor v Dato Mak Hon Kam & Ors* [1993] 3 MLJ 741; [1994] 1 CLJ 207 and *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337. The preliminary issue is in respect of limitation law. In the event the issue is decided in favour of the defendants, it would be unnecessary to proceed to trial. It is also my view that the issue whether the action is time barred can be suitably determined upon affidavit evidence for the following reason. The basic facts underlying the issue of limitation in this case are common ground and not in dispute. There is no dispute that the land was subjected to compulsory acquisition in 1973. There is no dispute that instead of fulfilling the avowed public purpose of acquisition, ie the construction of an institute of higher learning, the state government alienated the land to third parties in 1992. There is also no dispute that the plaintiff request for the return of the land in 2008 but was rebuffed. Finally, it is a matter of filing record that the instant action was instituted only on 4 November 2010.

E WHETHER ACT OF RE-ALIENATING THE LAND UNLAWFUL

- [10] The plaintiff's cause of action is based on act of the Sabah Government in acquiring the land of the plaintiff for a public purpose and subsequently alienating it to third parties. There is no argument that the acquisition was not completed according to the proper procedure or that the plaintiff was not compensated. The only complaint is that the land was not used for the construction of an institute of higher learning which was the specified purpose of the acquisition. The argument of the Sabah Attorney General in respect of the limitation issue is as follows.

- [11] Under s 2(a) of the Public Authorities Protection Act 1948 (Act 198) ('PAPA'), the limitation period to commence an action against the government is 36 months. Section 2(a) of the PAPA reads as follows:

- H Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —
- I (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[12] The land in question was alienated to third parties in 1992. However, the plaintiff only filed this action some 18 years later in 2010. The above facts are not in dispute as I pointed out earlier. As limitation is an absolute defence, if it applies to the facts of given case, the Sabah Attorney General submitted that the action ought to be dismissed.

[13] The reply by counsel for plaintiff is twofold. Her first reply is based on the case of *United Development Company Sdn Bhd v The State Government of Sabah & Anor* [2011] 7 MLJ 209; [2010] 5 CLJ 98. The brief facts of that case are as follows. The Sabah Government acquired a parcel of land in 1979 for a resettlement scheme. However, the *gazette* notification of the acquisition of the land was only published in 1996. The land was not put to use for the purpose it was acquired as the government indicated that it would used for 'Taman Kekal Pengeluaran'. The request of the plaintiff for the return of the land was similarly rejected. The parties agreed for the following issues to be tried:

- (a) whether the compulsory acquisition of the said land was ultra vires s 3 of the Land Acquisition Ordinance (Sabah Cap 69) ('LAO') and/or art 13 of the Federal Constitution;
- (b) whether the defendants by acquiring the said land had acted mala fide by not putting to use the said land for the specified purpose it was acquired;
- (c) whether the plaintiff is still the owner of the said land and if not, whether the plaintiff is entitled to take possession of the said land by paying or refunding to the defendants the sum of RM1m without interest; and
- (d) in that event, whether the defendants are liable to pay the plaintiff further compensation and/or damages.

[14] The High Court held as follows:

- (a) that the acquisition was unlawful;
- (b) that mala fide on the part of the government had been established; and
- (c) the plaintiff remained as the owner of the land.

[15] However, the above case is not applicable to the issue at hand in the instant case for two reasons. This is because the limitation rule under PAPA was not an issue that was determined by the court in *United Development Company Sdn Bhd v The State Government of Sabah & Anor*. In the instant case, the question whether limitation has set in is the preliminary issue. In the event this issue is determined in favour of the defendants, it would unnecessary to delve into the merits of the claim such whether the act of the Sabah Government in re-alienating the land to third parties was tainted by mala fide. The second reason is that the learned Sabah Attorney General submitted without being contradicted by counsel for the plaintiff that the above case was reversed by the

A Court of Appeal and leave to appeal was refused by the Federal Court.

WHETHER ACTION TIME BARRED

B [16] Counsel for the plaintiff has not disputed that the limitation period under PAPA is only 36 months and that the land in question was alienated to third parties in 1992. However, the mainstay of her argument that limitation has not set in lies in the following passage from the judgment of the Court of Appeal in the case of *Balare Jabu & Ors v Merawa Sdn Bhd & Ors* [2011] 4 CLJ 751:

C While limitation appears to be a complete answer to a suit, action or proceeding for remedy, *it is no answer to a suit, action or proceeding for declaratory orders.* A declaration whether the issuance of a licence is subject to native customary rights and whether the second and third respondents were in breach of a fiduciary duty pertaining to constitutional rights of the appellants, to know whether they have been wronged or not, is not purely academic. (Emphasis added.)

D [17] The appeal of the Sarawak Government to the Federal Court in the above mentioned case was dismissed by the Federal Court. The question of law posed to the Federal Court was as follows:

E Whether the defence of limitation under section 2 Public Authorities Protection Act 1948 and/or Sarawak Limitation Ordinance, is an answer to a suit, action, or proceedings for declaration or declaratory orders.

F [18] However, in its judgment, the Federal Court did not say that the limitation law is suspended insofar as declaratory prayers are concerned. The above mentioned case concerned customary rights of the natives of Sarawak. A timber licence which is subject to the native customary rights of the plaintiffs had been granted to the first defendant. The licence was still valid and subsisting at the time the action was filed. It is for this reason that the Federal Court ruled as follows:

G As such we are of the view that as long as the Licence remains valid, it continues to be subject to the Respondents' NCR, if any, and rights in respect of the land concerned.

H [19] It is for this reason also, the Federal Court relied on the second limb of s 2(a) of the PAPA which reads as follows:

I in the case of a *continuance of injury or damage*, within thirty-six months next after the ceasing thereof. (Emphasis added.)

[20] However, the factual matrix of the instant case is totally different. In the

instant case, the plaintiff has prayed for a declaration that the acquisition was unlawful because the land was not put to use for the specified purpose it was acquired. There is no argument there is a 'continuance of injury or damage'. There is no argument that the notification of the acquisition was not properly *gazetted*. There is no argument that the plaintiff was not properly compensated in 1973. As the acquisition process was properly completed, the plaintiff's right to the land had been severed. The plaintiffs in the *Balare Jabu's* case on the other hand were able to raise a cogent argument that the timber licence was subject to their pre-existing native customary right. Therefore, it is my opinion that the mere formulation of a declaratory prayer by the plaintiff in the instant case cannot prevent the limitation period prescribed in s 2(a) of the PAPA from affording an absolute defence to the action.

[21] In conclusion, I shall answer the first question in the affirmative and dismiss the action of the plaintiff. As the learned Sabah Attorney General is not praying for costs, I shall make no order in respect of the same.

*Plaintiff's claim dismissed.*

Reported by Afiq Mohamad Noor

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